Supreme Court, U.S.
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Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

ARNAUD GIRARD and NAJA BISSAR - PETITIONERS

Vs.

THE CITY OF KEY WEST - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ARNAUD GIRARD
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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER a deliberate refusal by a city final policymaker to grant a review of acts of a subordinate requested by an aggrieved party allows city to claim lack of liability on the ground that such policymaker didn't review the issue?

II. WHETHER a delegation of final policymaker authority can be the source of municipal liability absent statutory legal support?

III. WHETHER a final policymaker who deliberately refuses to review a complaint concerning a subordinate's decision should be deemed to have adopted the decision and motive for it for purposes of municipal liability?

IV. WHETHER, when a plaintiff makes a showing of refusal to review by a final policymaker, a Defendant city should have to demonstrate that the laws of the city framed a clear, reasonable, and compellable appeal process?

V. WHETHER 'custom and practice' requires proof of actual knowledge of the wide-spread practice before municipal liability can attach?

VI. WHETHER final policymakers knowledge can be inferred from the proof of wide-spread practice?

VII. WHETHER Plaintiffs' complaint had established a genuine issue of fact as to the existence of the City's unconstitutional custom and policies at work in the retaliatory actions against them?

VII. WHETHER the District Court when moving sua sponte on Summary Judgment should have notified Plaintiffs to file all of their evidence?

LIST OF PARTIES

All parties affected by this lawsuit at this time appear in the caption of the case on the cover page.

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JURISDICTION

The date on which the Untied States Court of Appeals decided this case was October 25, 2001.

A timely petition for rehearing was denied by the United States Court of Appeals on July 15, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C.1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

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STATEMENT OF THE CASE

Petitioners sued the City of Key West under 42 U.S.C. § 1983 for Equal Protection clause and First Amendment/Free Speech violations resulting from retaliatory conduct on the part of city officials after Petitioners organized a tenants association opposing the City's development plans for a City-owned marina (Key West Bight Marina) and publicly charged officials with fraudulent management in violation of federal regulations.

Prior to suing the City, Plaintiffs had made a written request for hearing to the City Manager and the Key West Bight Management District Board (City appointed board overseeing the marina) seeking review of the Bight Manager's various adverse decisions. Such requests for administrative review were denied.

The City Attorney informed Plaintiffs that the Bight Manager's adverse decisions were final and were the "City's position".

Plaintiffs filed this lawsuit alleging that City officials in a final policymaking position had violated their constitutional rights through eviction, arrest without probable cause and various unlawful seizures of property.

Since the retaliation intensified as a result of filing suit, Plaintiffs amended their complaint to add more police retaliation and evictions and charged that the City Commission repeatedly affirmed a policy of "not doing business with people who are suing the City" and that the Commission had granted overbroad and unbridled discretion to the Bight Manager in allowing him the right to "refuse to offer dockage to anyone for any reason" and that such policies supported the retaliatory animus.

Plaintiffs also charged that given the number of incidents of constitutional deprivations (greater than 10) and the number of people (four) claiming similar discriminatory

treatment, the City had a custom of retaliation against First Amendment activists at City-owned marinas.

The Defendant moved for Summary Judgement on the basis that the Bight Manager was not the final policymaker but was under the supervision of the City Manager. The District Court agreed with that interpretation. The Court, acting sua sponte, also rejected Plaintiffs' custom and policy arguments on the grounds that although there may have been a custom of retaliation against free speech as evidenced by repeated incidents, Plaintiffs furnished no evidence that the final policymakers had knowledge of the custom.

The U.S. Court of Appeals for the Eleventh Circuit upheld the District Court's judgment..

REASONS FOR GRANTING CERTIORARI

A] FINAL POLICYMAKER DEFENSE

Applying Monell v. Department of Social Services, 98 S.Ct. 2018 (1978), the U.S. Court of Appeals for the Eleventh Circuit upheld the summary judgment dismissal of this case stating that the City was not liable for the acts of the Bight Manager (city-owned marina manager) since he was not a City final policymaker but was under the supervision of the City Manager as a matter of law.

However, the evidence shows that Plaintiffs had expressly requested review of adverse decisions taken by the Bight Manager, by certified mail sent directly to the City Manager, who declined to review Plaintiffs' grievances.

It would seem that the City has escaped liability by deliberately obstructing its own appeal process.

Commentaries as well as the dissenting opinions in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) have predicted that City policymakers might now have an incentive to muddy their administrative appeal process and to decline to use their plenary oversight authority so as to avoid liability for the City.

Monell and its progeny recognize delegation of final policymaking authority as a bonafide source of municipal liability but, at the same time, the Court requires:

> In any event, however, a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it.
> Praprotnik,, 485 U.S. 112, 126

In many instances like in this case, however, the delegation will not leave any statutory imprint so as to identify the new policymaker under an inquiry based solely on the law.

This has left a serious loophole in matters of municipal liability. A municipality may simply delegate its most questionable activities (especially in the new trend of municipalities as business entities) to lower level employees without leaving a trace of a statutory transfer of policymaking authority and so long as the statutory policymaker makes sure not to review any controversial issues, the municipality will have insured everlasting immunity.

In the case at bar:

The City in a takeover of the harbor (Key West Bight) creates a Community Redevelopment Agency, funded with municipal bonds, having its own unique budget and administration headed by the Bight Manager and the Key West Bight Board. The gentrification plan creates immediate friction between the Bight Manager and Plaintiffs who complain of various acts of retaliation against their political stance (tenants association).

However, the request for hearing sent to the City Manager as well as the Key West Bight Board are never answered. Plaintiffs complaints are, rather, redirected to the Bight Manager who makes such policy statements as to who is or is not entitled to be heard by the Key West Bight Board.

Regarding the Bight Manager's denial of dock space, Plaintiffs make a request for the City's final order which is forwarded to the City Attorney. The City Attorney formalizes the Bight Manager's decision defining it as "the position of the City of Key West," and does not notify Plaintiffs of any available appeal process, as is required by law if such a process exists.

The Bight Board repeatedly refuses to hear Plaintiffs and when a hearing is compelled after Plaintiffs petition the County Court to obtain this administrative remedy, the Bight Board declares that they "do not wish to undermine what the manager is trying to do (specifically evict Plaintiffs).

A few years later the City Commission decides to bring the office of the Bight Manager into the City administration, expressly stating that he will now be under the supervision of the City Manager.

However this means the entire time previous to the 1996 amendment, every policymaker in the City, including the City Commission, had agreed to a broad delegation of absolute final policymaking authority in favor of the Bight Manager.

However, once the City gets sued for acts of the Bight Manager (acts occurring while the 1993 ordinance was in effect), the City invokes the Monell defense compelling the Court to rule that the Bight Manager was under the statutory supervision of the City Manager according to a very vague City Charter provision and that therefore the City may not be held liable.

This Court in Praprotnik noted:

> If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, 1983 could not serve its intended purpose.
> Praprotnik, 485 U.S. 112, 126

Monell was set on an assumption that cities will fairly guide their aggrieved citizens through the appeal process, not the contrary. However, the contrary is just what cities will be more and more tempted to do as they swing more towards unregulated private business domains with enormous projects and pressures such as twenty million dollar high interest

mortgages as in the case at bar. City officials' patience could predictably run out under the pressure pushing them to engage their governmental powers in conduct resembling that of private corporations towards those citizens who would stand between them and their stringent financial goals and obligations; and of course cities would attempt to avoid constitutional liability that their private competitors do not face.

The Court should close the loophole and find that a final policymaker who deliberately refuses to review a complaint directed toward him about a subordinate employee is deemed to have agreed with subordinate's decision and the motives for it since he had an opportunity to redress the wrong and refused to, thereby giving rise to municipal liability.

Furthermore, the Court should enlarge the policymaker inquiry to include review of the supervisory appeal process.

Quite simply, if the City had an appeal process associated with every administrative order which required notice of how and when the order is reviewable any aggrieved party could simply follow the track or petition the County Court for writ of mandamus. If a defendant cannot show that its laws had made available to Plaintiff a clear, reasonable, and compelling appeal process, the simple fact that the law describes a 'supervisor' who had refused to use his reviewing power should not be in and of itself enough to invoke the Monel defense. Such is the situation in the case at bar.

B] CUSTOM AND PRACTICE

This Court has recognized that a city can be held liable for its customs and practices. Plaintiffs have supported their allegation of City's wide-spread practice of retaliation against First Amendment rights at City marinas by presenting 10 separate incidents of retaliation linked to their exercise of protected speech and have filed three affidavits of people who also claim they were evicted from the docks in retaliation for their public criticism of City management of the harbor.

Most federal circuits , applying Oklahoma City v. Tuttle, 471 U.S. 808 (1985), use the "more than one isolated incident" standard . However, the issue of level of municipal involvement in the custom required for purposes of attaching liability has become very devisive:

In the case at bar, the District Court ruled that Plaintiffs offered no proof of City's knowledge of the custom and that proof of complaints of the same nature to the city's policymakers didn't show that those policymakers were aware that the practice was indeed "wide-spread". The Eleventh Circuit affirmed.

The Fourth Circuit, requires proof not only of knowledge but also that the city condoned the practice. See Spell v. McDaniel, 824 F.2d 1380 at 1391(4th Cir).

However, in the Tenth Circuit and Eighth Circuit liability attaches when a wide-spread practice is shown and that the city policymakers when notified of a case regarding that particular unconstitutional conduct showed "deliberate indifference" or tacitly authorized the conduct. See McGartha v. Jackson County, 36 F.3d 53 at 56 (8th Cir. 1994) or Gates v. Unified School District , 996 F.2d 1035 (10th Cir. 1993). This is quite different from the Eleventh Circuit which requires proof of knowledge that a wide-spread practice exists.

For the Ninth Circuit knowledge is inferred from the wide-spread practice:

> [I]t is open to the city to show that the custom was not known to the policymakers of the Department, but the absence of formal reports of Blair's harassment is only an element of evidence as to their knowledge; it is not dispositive.

Blair v. City of Pomona, 223 F.2d 1074 (9th Cir)

Finally, even within the same case, in the case at bar, the first presiding District Court judge (honorable Judge James C. Paine) ruled twice against Defendants Motions to Dismiss and Summary Judgement finding that Plaintiffs had brought forth a viable custom and practice claim which, when drawing all inferences in their favor, could be adduced to be a custom and practice which the City's final policymakers had authorized.

The next presiding judge, however, (honorable Judge K. Michael Moore) ruled that Plaintiffs had failed to prove that the City policymakers knew that a wide-spread custom existed and dismissed the complaint.

There is obviously a quest for the correct standard to determine city liability within the custom and practice doctrine.

Plaintiffs argue that the Eleventh Circuit's requirement of actual knowledge of the final policymaker of the existence of a wide-spread practice is improper and that once the custom is in evidence, the proper standard requires rather a showing of approval or deliberate indifference to conduct similar to the one furthered by the unconstitutional custom.

The knowledge requirement brings the remedy too close to having the same burden of proof as in a case regarding a 'single isolated incident'. It defies the entire purpose of the doctrine of 'custom and practice' which is

meant to deal with "the most egregious intent by municipalities to shield themselves from liability" (Praprotnick, supra). In other words, a context of bad-faith and hidden intentions.

The issue of knowledge of the existence of the custom is really not dispositive. Knowledge would not always mean approval and approval of unconstitutional conduct similar to the one championed by the custom should not require knowledge that the conduct is wide-spread.

However, if a Plaintiff makes a showing that 1) the complained of conduct is widespread and 2) the city policymakers have tolerated or have been deliberately indifferent to action similar to the one supported by the custom then it could be fairly said that the custom has reached all the way to the top of the municipal hierarchy where municipal liability can attach.

The Ninth Circuit utilizes similar reasoning:

> Plaintiffs may prove the existence of a custom or informal policy with evidence of repeated constitutional violations for which the errant municipal officials were not discharged or reprimanded.
>
> Gillett v. Delmore, 979 F.2d 1341,1348 (9th Cir. 1992)
>
> Once such a showing is made a municipality may be liable for its custom irrespective of whether official policymakers had actual knowledge of the practice at issue.
>
> Thompson v. City of Los Angeles, 885 F.2d at 1444 (9th Cir.)

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Under these standards the District Court should have inferred the existence of a city custom based on the large number of incidents (10 for Plaintiffs alone plus three other people with similar claims of retaliation) and the fact that the final policymakers were notified but refused to redress the wrongs or make any effort to abate the practice.

Furthermore, city approval of the custom should be analyzed in relation with city officials' known policies which have a similar unconstitutional goal.

Those policies and the City's liability in relation to them are addressed in the final part of this petition. They consist of repeated official declarations by the City Commission and unanimous enforcement of an unconstitutional policy "not to do business with people suing the City". And a written policy of granting unbridled discretion to the Bight Manager to deny dockage "to any one for any reason."

Those policies together with the City's failure to take any action to abate the numerous claims of misconduct could convince a jury that city policymakers were in fact satisfied with the practice of uprooting one by one all those who actively opposed the City's gentrification plans at the marina, even if the City had no actual knowledge of how "wide-spread" the practice was.

C] POLICIES

The District Court ruled that allegations of an official unconstitutional policy "not to do business with people suing the city" didn't give rise to municipal liability because there was no proof that the final policymakers knew that their policy was being enforced. This may be the jurisprudence of the Eleventh Circuit but Plaintiffs argue that this reasoning is in error where the District Court should have applied a presumption that the policy was being enforced.

Once a policy is officially stated, it takes a life of its own and the city should be held liable for the actions its policy has compelled whether or not the city policymakers are aware of specific incidents of its implementation. Employees will try to apply the policy and indeed city officials refused to renew leases and dockage agreements with Plaintiffs after they sued the City.

D] MOVING FORCE

The District Court also ruled that there was no proof that the custom or policies were the 'moving force' behind the constitutional deprivations.

Plaintiffs argue that under a well-settled jurisprudence when First Amendment rights are evoked, proof of causal link requires only a showing that the alleged retaliatory conduct and the protected activity are not wholly unrelated. The burden then shifts to the Defendant to show that he would have taken the same course of conduct absent the expression of the protected speech.

Plaintiffs opposition to Defendant's Summary Judgement Motion clearly established 'the causal link' and no rebuttal was offered by Defendant.

E] *SUA SPONTE* SUMMARY JUDGMENT

Finally, a large part of the difficulty in the present Summary Judgment ruling on Plaintiffs' claim of policy and 'custom and practice' comes from the fact that the District Court acted sua sponte without notifying Plaintiffs who as a result did not file all of their evidence on that issue. The Defendant had only addressed the final policymaker issue and had offered no evidence rebutting Plaintiffs claim that the

City's policies and customs were the moving force behind the retaliatory evictions, arrest without probable cause, etc.

Plaintiffs were in a situation where the custom claim had been twice upheld by the previous District Court judge in orders partially denying motions to dismiss/summary judgment and an appeal to the Eleventh circuit and was not challenged by the Defendant. Plaintiffs concentrated in establishing the "causal link" between the protected speech and the retaliation as explained supra ('moving force' and shifting burden of proof).

Plaintiff, at the closing of discovery had transferred to Defendant irrefutable proof, not only of the City's policymakers knowledge but of their involvement in the retaliatory conduct. Those memos and transcripts of public record were not in evidence prior to the judge's ruling.

The District Court erred in not notifying Plaintiffs to file all of their evidence for purposes of sua sponte Summary Judgement by the Court. See Celotex Corp. V. Catrett, 477 U.S. 317, 326, 106 S.ct. 2548, 2554, 91 L.Ed 2d 265 (1986)

CONCLUSION

It would be beneficial to address the future of what appears to be a serious loophole in the rules governing municipal liability. The present situation creates a complete uncertainty for complainants who, like Plaintiffs apply due diligence in attempting to exhaust all administrative remedies and end up suing for redress only to be denied that right based on some incomprehensible technicality.

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1. -City Manager's office directing police to go arrest Plaintiff: "Throw the book at him..... he's been giving us a hard time."

-Memo - from 2nd Bight Manager notifying Mayor he is changing tenancy at will rules at the dock so as to evict Plaintiffs immediately.

Little did they know, that the city official who had been clearly identified , by everyone, as the final policymaker was a decdy policymaker and the real one who played dead was to come back to life to have the case dismissed in the eleventh hour.

There must be a solution to this sort of dilemma. There should be some degree of accountability, some link, between the immunity and how clearly the law defines, not only whether a particular official has a supervisor, but whether a citizen's right to obtain review is reasonably framed as to the essential elements of how, when and to whom he should present a request for review.

To invoke the Monell defense a city should have to come forward, not only with some evidence that it is written somewhere that an official has a supervisor , but it should also make a showing that a particular Plaintiff had, by law, a clear, reasonable, and enforceable avenue to obtain review by the purported supervisor (final policymaker).

Absent such a clear showing, proof that a statutory supervisor deliberately refused to review should be construed as an act of the final policymaker endorsing its subordinate's decision and giving rise to city liability.

So there should be a statutory method for citizens to address the vanishing final policymaker syndrome rather than to have no alternative but to interview half the town and research twenty years of journalistic history and public record to figure if their case wouldn't, by any chance, be part of a wide-spread custom.

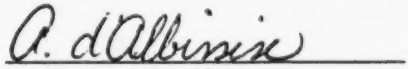
If such a wide-spread custom can be evidenced, of course, it becomes another way for a plaintiff to have liability attach to the municipality. The difficulty is that the standard of city involvement has been made so high by certain circuits that the custom remedy can barely be distinguished from the "isolated incident" standard.

Unconstitutional custom should not be treated as official policy or deliberate political guidance. No one actually invented or created the custom of retaliation against free speech, the City of Hattisburg in Adickes v. S.H. Kress and Company, 90 S.Ct.1598 (1970) didn't invent racism. The unveiling of a 'custom' is only a mapping of human weaknesses for prejudice and intolerance. It is rather like a disease and the question is less who created or knows about it than who is infected with it. The real questions are: Has it reached the higher levels of government or not? Are the policymakers plagued with retaliatory animus?

Plaintiffs should not have to show actual knowledge of 'wide-spread' practice, they should have to show that such a practice exists and that in instances of clear knowledge of misconduct similar to the one championed by the custom, the City's final policymakers appear deliberately indifferent and fail to act towards redress.

Plaintiffs had the right to voice their opinions without being thrown in jail, financially ruined, and ostracized by the City of Key West. They respectfully request the opportunity to brief this honorable court about these issues.

Respectfully submitted,



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No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

ARNAUD GIRARD and NAJA BISSAR - PETITIONERS
Vs.
THE CITY OF KEY WEST - RESPONDENT

_____

PROOF OF SERVICE

I, Naja GIRARD, do swear or declare that on this date, December ____, 2003, as required by Supreme Court Rule 29 I have served 3 copies of the enclosed PETITION FOR WRIT OF CERTIORARI and the APPENDIX on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

David J. Audlin, Jr. , Esq.
415 Eaton Street
Key West, FL 33041

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16th, 2003.